

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

February 25, 2016 at 1:30 p.m.

1. [13-23119](#)-E-13 CYNTHIA MCDONALD
[14-2210](#)
MCDONALD V. JPMORGAN CHASE
BANK, N.A. ET AL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
7-21-14 [[1](#)]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Amy M. Spicer

Adv. Filed: 7/21/14

Answer: 10/30/15

Nature of Action:

Recovery of money/property - other

Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~.

Notes:

Continued from 11/19/15 to allow the court to address the scope of the core and non-core issues. Defendants to file and serve supplemental brief on or before 1/20/16. Plaintiff to file and serve response on or before 2/3/16. Reply brief to be filed and served by 2/10/16.

Court requested documents not filed as of 2/18/16.

FEBRUARY 25, 2016 STATUS CONFERENCE

The court's review of the Docket shows that Defendant has not filed the supplemental briefing order by the court. No updated status report has been filed and the Parties do not provide the court with any information as to the diligent prosecution or defense of this Adversary Proceeding.

At the Status Conference ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~.

SUMMARY OF COMPLAINT

The Complaint itself is thirteen (13) pages long. The Complaint states the following Causes of Action:

I. First Cause of Action Objection to the JPMorgan Chase Bank Proof of Claim.

A. The substance of this Objection is that Proof of Claim No. 2 filed by JPMorgan Chase Bank, N.A. misstates the claim because it lists the following information,

1.Principal Balance.....\$187,774.58

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2.Arrearage.....\$ 22,403.04
3.Which Amounts Total.....\$210,177.62.

B. However, JPMorgan Chase Bank, N.A. has filed the claim for the lesser amount of \$204,873.32, which is \$5,300.00 less than the total of the principal amount and arrearage.

C. The amount of the Proof of Claim and the total of the Principal Balance and Arrearage cannot be reconciled.

D. This difference which cannot be reconciled is sufficient to disallow the Proof of Claim.

II. Second Cause of Action for Violation of California Rosenthal Act.

A. It is asserted that Plaintiff misapplied non-specific payments made by Plaintiff in 2012 and 2013, and that by misapplying the payments Defendant violated the Rosenthal Act.

B. It is asserted that the Proof of Claim filed is a misrepresentation of the debt, and such misrepresented Proof of Claim is a violation of the Rosenthal Act.

III. Third Cause of Action for Negligence.

A. It is alleged that JPMorgan Chase Bank, N.A. had a duty to file a Proof of Claim in Plaintiffs bankruptcy case which has some semblance of accuracy.

B. JPMorgan Chase Bank, N.A. violated the duty to file such proof of claim when it filed Proof of Claim No. 2 in Plaintiffs bankruptcy case.

IV. Fourth Cause of Action for Fraud and Intentional Misrepresentation (Cal. Civ. §§ 1572, 1709, and 1710)

A. It is alleged that when JPMorgan Chase Bank, N.A. filed Proof of Claim No. 2 it knew that the information therein was false. It is alleged that the Bank misapplied payments made by Plaintiff.

V. Fifth Cause of Action for Violation of Real Estate Settlement Procedures Act (12 U.S.C. §§ 2601 et seq.).

A. JPMorgan Chase Bank, N.A. misapplied nonspecified payments made by Plaintiff for the loan upon which Proof of Claim No. 2 is based.

VI. Sixth Cause of Action for Breach of Contract

A. It is alleged that JPMorgan Chase Bank, N.A. has breached the terms of the contract (promissory note) with Plaintiff. The breach of contract arises from misapplying nonspecified payments made by Plaintiff.

VII. Seventh Cause of Action for Conversion.

A. It is alleged that JPMorgan Chase Bank, N.A. misapplying nonspecified payments made by Debtors to the Bank on the loan constitutes a conversion of said monies.

VIII. Eight Cause of Actions for Attorneys Fees.

A. Pursuant to a nonspecified term of the Note and Deed of Trust and the California Civil Code, Plaintiff is entitled to attorneys fees.

SUMMARY OF ANSWER

JPMorgan Chase Bank, N.A. and US Bank National Association as Trustee, have filed an answer which specifically admits and denies allegations in the Complaint. The Answer also states seven affirmative defenses.

FINAL BANKRUPTCY COURT JUDGMENT

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 1, 3, and 4; Dckt. 1. Plaintiff consents to the bankruptcy judge issuing all orders and final judgment for non-core matters, if any, stated in the Complaint.

In their answer, Defendants admit the allegations of jurisdiction and that the determination of validity and amount of Defendants' claim in the bankruptcy case are core proceedings. Answer ¶¶ 1 and 3, Dckt. 30.

Defendants affirmatively plead that the "do not consent to the entry of a final judgment by this Court as to any and all matters as to which Defendants, or either of them, have a right to the entry of a final judgment by an Article III court. The Answer does not identify which claims in the Complaint are non-core matters.

At the hearing the parties addressed the possible non-core claims which do not require the bankruptcy judge to determine in determining the validity and amount of Defendants' claim, identifying them as

To afford the parties the opportunity to brief the issue of whether such claims are core or non-core the court set the following briefing Schedule and continued Status Conference:

- A. Defendants shall file and serve on or before December January 20, 2016, a supplemental brief identifying the non-core claims and the legal analysis upon which the assertion of non-core status is based.
- B. Plaintiff shall file and serve, on or before February 3, 2015, a response supplemental brief responding to the asserted non-core claims and Plaintiff's legal analysis upon which it is contended that they are core claims.
- C. Reply brief February 10, 2016.
- D. The continued status conference will be conducted at **1:30 p.m. on February 25, 2016**, at which the court shall address the scope of the core and non-core issues.

2. [11-27845](#)-E-11 IVAN/MARETTA LEE MOTION TO DISMISS CITY OF
[15-2194](#) BMV-1 SACRAMENTO AND CITY OF
LEE ET AL V. SHELLPOINT SACRAMENTO COMMUNITY
MORTGAGE SERVICING ET AL DEVELOPMENT DEPARTMENT
1-25-16 [[45](#)]

Final Ruling: No appearance at the February 25, 2016 hearing is required.

The court having previously entered an order dismissing without prejudice the Motion to Dismiss (Dckt. 75), this matter is removed from calendar.

3. [11-27845](#)-E-11 IVAN/MARETTA LEE MOTION TO STRIKE
[15-2194](#) BMV-2 1-25-16 [[50](#)]
 LEE ET AL V. SHELLPOINT
 MORTGAGE SERVICING ET AL

Final Ruling: No appearance at the February 25, 2016 hearing is required.

The court having previously entered an order dismissing without prejudice the Motion to Strike (Dckt. 79), this matter is removed from calendar.

4. [09-94269-E-7](#) SUSHIL/SUSEA PRASAD
[15-9018](#)
FERLMANN V. PRASAD ET AL

CONTINUED STATUS CONFERENCE RE:
AMENDED COMPLAINT
10-2-15 [[44](#)]

Plaintiff's Atty: Matthew J. Olson; Roxanne Bahadurji
Defendant's Atty:
William A. Munoz; James Murphy [Meyer Wilson Co., LPA]
Steve Altman [Sushil Prasad; Susea S. Prasad]
Hilly Estioko; Jason S. Haselkorn [Transamerica Financial Advisors, Inc.]

Adv. Filed: 5/29/15 [Trustee]
Answer: none

First Amd. Cmplt. Filed: 6/19/15 [Trustee]
Answer: 7/31/15 [Meyer Wilson Co., LPA]
Counterclaim Filed: 7/31/15 [Meyer Wilson Co., LPA]
Answer: 8/21/15 [Trustee]

Second Amd. Cmplt. Filed: 10/2/15 [Trustee]
Answer: 10/22/15 [Transamerica Financial Advisors]
10/22/15 [Sushil Prasad and Susea Prasad]
10/22/15 [Meyer Wilson Co., LPA]
11/12/15 [First Amd. Answer - Transamerica Financial Advisors]

Crossclaim Filed: 10/22/15 [Meyer Wilson Co., LPA]
Answer to Meyer Wilson Co., LPA's Crossclaim:
11/9/15 [Trustee]

Crossclaim Filed: 10/22/15 [Transamerica Financial Advisors]
Amended Crossclaim Filed: 11/12/15 [Transamerica Financial Advisors]
Answer to Transamerica Financial Advisors' Crossclaim:
12/8/15 [Sushil Prasad and Susea Prasad]
Crossclaim Filed: 12/8/15 [Sushil Prasad and Susea Prasad]
Answer to Sushil Prasad and Susea Prasad's Crossclaim:
12/22/15 [Meyer Wilson Co., LPA]

Nature of Action:
Recovery of money/property - other
Other (e.g. other actions that would have been brought in state court if
unrelated to bankruptcy case)

The Status Conference is XXXXXXXXXXXXXXXXXXXXXXXXXXXX.
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Notes:
Continued from 12/17/15

[MF-2] Motion to Compel filed by Trustee 1/26/16 [Dckt 78], set for hearing
2/25/16 at 1:30 p.m.

Appeal: Receipt of Pleadings and Documents from the United States District
Court [Order Denying Motion to Withdraw the Reference] filed 2/4/16 [Dckt 90]

Defendants and Counter-Claimants, Sushil Prasad and Susea S. Prasad, Status
Conference Statement filed 2/10/16 [Dckt 91]

FEBRUARY 25, 2016 STATUS CONFERENCE

At the Status Conference the court addressed with the Parties the identification of core and non-core matters in this Adversary Proceeding.
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The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

- a. Initial Disclosures shall be made on or before -----, 2016.
- b. Expert Witnesses shall be disclosed on or before -----, 2016, and Expert Witness Reports, if any, shall be exchanged on or before -----, 2016.
- c. Non-Expert Discovery closes, including the hearing of all discovery motions, on -----, 2016.
- d. Expert Discovery closes, including the hearing of all discovery motions, on -----, 2016.
- e. Dispositive Motions shall be heard before -----, 2016.
- f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at ----- p.m. on -----, 2016.

REVIEW OF PLEADINGS, CORE AND NON-CORE STATEMENTS, AND CONSENTS AND NON-CONSENTS TO BANKRUPTCY JUDGE ISSUING FINAL ORDERS AND JUDGMENTS FOR NON-CORE MATTERS

PLAINTIFF TRUSTEES SECOND AMENDED COMPLAINT

On October 2, 2015, the Trustee filed a Second Amended Complaint ("SAC"). Dckt. 44. The Second Amended Complaint alleges claims for and seeks the following relief:

- A. Allegations of Jurisdiction and Core Matters
 1. Jurisdiction is asserted to exist pursuant to 28 U.S.C. §§ 151, 157(a), 157(b)(2), and 1334. SAC ¶ 2.
 2. It is alleged that this Adversary Proceeding is a core proceeding pursuant to:
 - a. 28 U.S.C. § 157(b)(2)(A), "matters concerning administration of the estate; and
 - b. 28 U.S.C. § 157(b)(2)(E), "orders to turn over property of the estate."
- B. Debtors, Sushi and Susea Prasad, commenced their Chapter 13 bankruptcy case on December 30, 2009. It was converted to a case under Chapter 7 on December 21, 2012. SAC ¶ 1.
- C. Meyer Wilson Co., LPA, ("Defendant Attorneys") represented Debtors in *Prasad et. Al. V. World Group Securities, Inc.*, Financial Industry Regulation Authority Office, Case No. 12-00334, (the

"Arbitration Claim") filed on January 31, 2012. SAC ¶¶ 7, 9

- D. The claim related to the conduct of a broker working for World Group Security, Inc. ("WGS"), including claims for fraud, operation of a Ponzi scheme, and failure to supervise the broker. SAC ¶ 9.
- E. It is alleged that Debtors concealed the existence of the Arbitration claim during their 341 Meeting on January 31, 2013. SAC ¶ 10.
- F. On April 13, 2013, Debtors executed a Mediation Settlement Statement agreeing to accept \$105,000 in settlement of their claim, with attorneys' fees and expenses to be paid from that amount. The net proceeds of the settlement is computed to be \$59,822.03, after payment of expenses and costs. SAC ¶ 11.
- G. The Settlement Agreement was executed on April 29, 2013. SAC ¶ 12. It provides for payment of the \$105,000.00 to Defendant Attorneys, as counsel for Debtors. SAC ¶ 12.
- H. The claims and settlement proceeds thereof are asserted to be property of the bankruptcy estate. SAC ¶ 13.
- I. Debtors did not seek and the bankruptcy court did not approve the Settlement and Debtors have not amended their Schedules to list the rights and claims as assets. SAC ¶ 15.
- J. Defendant Attorneys were not authorized as counsel pursuant to 11 U.S.C. § 327 and Defendant Attorneys have not sought the allowance of fees pursuant to 11 U.S.C. § 330. SAC ¶ 16.
- K. It is alleged that Debtors advised Defendant Attorneys that Debtors had filed bankruptcy and Debtors' case was pending. SAC ¶ 17.
- L. Claims to avoid and recover the full \$105,000 is asserted as arising pursuant to 11 U.S.C. § 549 (post-petition transfers) and § 550 are asserted against Debtors. First Claim for Relief, SAC ¶¶ 19-23.
- M. Claims to avoid the claim of the transfer of \$105,000.00 to Defendant Attorneys pursuant to 11 U.S.C. § 549 are asserted against Defendant Attorneys. Second Claim for Relief, SAC ¶¶ 24-27.
- N. Claims to avoid the claim of the transfer of \$105,000.00 to Defendant Attorneys pursuant to 11 U.S.C. § 549 are asserted against TAFI. Third Claim for Relief, SAC ¶¶ 28-32.
- O. Claims for violation of the automatic stay in purporting to settle and compromise rights and interests of the bankruptcy estate are asserted against all Defendants. Fourth Claim for Relief, SAC ¶¶ 33-36.
- P. Claims for the turnover and an accounting to the \$60,000.00 of the settlement proceeds by Debtors are asserted against Debtors. Fifth Claim for Relief, SAC ¶¶ 37-42.
- Q. Claims for the turnover and an accounting to the \$105,000.00 of the settlement proceeds by Debtors are asserted against Defendant Attorneys. Sixth Claim for Relief, SAC ¶¶ 43-48.

- R. Claims for professional liability for duties alleged to be owed to the Plaintiff Trustee are asserted against Defendant Attorneys with respect to the rights and interest of the estate which were the subject of the Settlement. Seventh Claim for Relief, SAC ¶¶ 49-53.

DEFENDANT ATTORNEYS' ANSWER AND COUNTERCLAIM

Defendant Attorneys admit and deny specific allegations in the First Amended Complaint. Defendant Attorneys plead sixteen affirmative defenses.

Answer of Defendant Attorneys to Second Amended Complaint

Meyer Wilson Co, LPA ("Defendant Attorneys") filed its Answer ("MWA") and a Counterclaim ("MWCC") on October 22, 2015. Dckt. 56. In the Answer:

- A. Defendant Attorney denies that the "bankruptcy court" has jurisdiction over this Adversary Proceeding. MWA ¶ 2.
- B. Defendant Attorney denies that the claims asserted in the Second Amended Complaint are core matters, and Defendant Attorney does not consent to the bankruptcy judge entering final orders and judgment on non-core matters. MWA ¶ 3.
- C. The Defendant Attorneys' Answer admits and denies specific allegations in the Second Amended Complaint.
- D. The Defendant Attorneys plead seventeen affirmative defenses, including:
 - 1. the claims are barred by the statute of limitations provided in 11 U.S.C. § 549(d) and 546(a);
 - 2. that the claims of Debtors accrued post-petition;
 - 3. the claims are barred by state law statute of limitations, Cal. C.C.P. §§ 337, 338, 339, 340, 340(3), 340.5, 340.6, and 343;
 - 4. Plaintiff Trustee lacks standing;
 - 5. The claims for punitive damages under California state law would violate Defendant Attorneys':
 - a. Constitution rights to substantive and procedure Due Process pursuant to the Fourteenth Amendment;
 - b. Constitute cruel and unusual punishment, and constitute excessive fines in violation of the Eighth Amendment;
 - c. Constitute a taking of private property for public use without compensation in violation of Defendant Attorneys' rights under the Fourteenth Amendment.

MWA ¶¶ 55, 56, 57, 61, 66, 69.

Counterclaim of Defendant Attorneys

In addition to the Answer, Defendant Attorneys filed a Counterclaim

against Plaintiff Trustee. The Counterclaim alleges:

- A. Federal court jurisdiction exists in the bankruptcy court pursuant to 28 U.S.C. §§ 157 and 1334, and because the Counterclaim relates to the Second Amended Complaint in this Adversary Proceeding. MWCC ¶ 73.
- B. The Counterclaim does not make the affirmative required allegations of whether the claims are core matters, and if not core matter, whether Defendant Attorneys consent to the bankruptcy judge entering final orders and judgment on the Counterclaim. See Fed. R. Bankr. P. 7008, which in addition to incorporating Fed. R. Civ. P. 8(a), requires:

"In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge."
- C. Debtors commenced their Chapter 13 case on December 30, 2009, and converted the case to one under Chapter 7 on December 21, 2012. MWCC ¶ 77.
- D. On August 19, 2010, Debtor invested monies with a broker at World Group Securities, Inc. MWCC ¶ 78.
- E. Debtors were the victims of fraud and a Ponzi scheme by the broker at World Group Securities, Inc. MWCC ¶ 78.
- F. Debtors learned of the fraud after the broker filed bankruptcy on August 19, 2010. MWCC ¶ 78.
- G. On January 31, 2012, Debtor Attorneys filed the Arbitration Claim for Debtors. MWCC ¶ 29.
- H. The causes of action asserted in the Arbitration Claim accrued post-petition for the Debtors and are legal or equity interests of the Debtors pursuant to 11 U.S.C. § 541(a)(1). Thus, the claims are not property of the bankruptcy estate for Debtors bankruptcy case filed on December 30, 2009. MWCC ¶ 79. FN.1.

FN.1.

11 U.S.C. § 541. Property of the estate

"(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case."

- I. The proceeds of the Settlement were never property of the estate. MWCC ¶ 80.

- J. The First Claim for Relief requests the court determine the respective rights of the parties in the Arbitration Claim and the proceeds thereof. MWCC ¶¶ 81-84.

Defendant Attorneys Request for Jury Trial

Defendant Attorneys also filed its Demand for Jury Trial pursuant to Federal Rule of Civil Procedure 38(b). Federal Rule of Bankruptcy Procedure 9015 provides the procedure for jury trials in bankruptcy cases and adversary proceedings, incorporating the provisions of Federal Rule of Civil Procedure 38, 39, 47-49, and 51, and Federal Rule of Civil Procedure 81(c).

Plaintiff Trustee's Answer to Counterclaim

The Plaintiff Trustee has filed his Answer to the Defendant Attorneys' Counterclaim ("MWCC Ansr."), which responses include the following:

- A. The Plaintiff Trustee admits the allegations of federal court jurisdiction for the Counterclaim. MWCC Ansr. ¶ 1.
- B. The Answer does not state whether Plaintiff Trustee asserts that the counter claim is a core proceeding, and if not core, whether Plaintiff Trustee consents or does not consent to the bankruptcy judge entering the final orders and judgment thereon.
- C. The Answer admits and denies specific allegations in the Counterclaim.
- D. The Answer asserts one affirmative defense.

TRANSAMERICA FINANCIAL ADVISORS, INC.'S ANSWER AND CROSS COMPLAINT

Summary of Answer filed by Transamerica Financial Advisors, Inc.

Transamerica Financial Advisors, Inc, fka World Group Securities, Inc. ("TAFI") filed a First Amended Answer ("FAA") and Cross-Complaint ("FAACC") to the Complaint on October 22, 2015. Dckt. 70. In the First Amended Answer TAFI admits and denies specific allegations in the Second Amended Complaint. TAFI asserts seven affirmative defenses, including the doctrine of ratification and/or acquiescence, and injuries were not caused by TAFI.

TAFI denies the allegations that federal court jurisdiction exists pursuant to 28 U.S.C. §§ 151, 157(a), 157(b)(2), and 1334. TAFI FAACC ¶ 2.

TAFI also denies that the claims are core matters, and to the extent non-core consents to the entry of final orders and judgment in this Adversary Proceeding by the bankruptcy judge. TAFI FAACC ¶ 3.

Summary of Cross Complaint of Transamerica Financial Advisors, Inc.

TAFI asserts cross claims against Debtors, alleging:

- A. Federal court jurisdiction for the Cross Claim against Debtors exists pursuant to 28 U.S.C. §§ 1334(b) and 157(a). Further, that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(A), (E), and (O), and if not core, TAFI consents to the bankruptcy judge issue all final orders and judgement on the Cross Claim. TAFI CC

¶¶ 1, 2.

- B. In the First Claim for Relief, TAFI asserts claims for contractual indemnification from Debtors pursuant to the Settlement Agreement for any liability on the claims asserted by the Plaintiff-Trustee. TAFI CC ¶¶ 118-22.
- C. In the Second Claim for Relief, TAFI asserts claims for intentional and negligent misrepresentation against Debtors to the extent of any liability of TAFI to the Plaintiff Trustee. TAFI CC ¶¶ 23-30.
- D. In the Third Claim for Relief, TAFI asserts claims for equitable indemnification and contribution against Debtors. TAFI CC ¶¶ 31-36.
- E. In the Fourth Claim for Relief, TAFI asserts claims for restitution or unjust enrichment against Debtor to the extent of any liability of TAFI to the Plaintiff Trustee. TAFI CC ¶¶ 37-39.

DEBTORS ANSWER AND CROSS CLAIMS

Summary of Debtor's Answer to Cross Claim of Transamerica Financial Advisors, Inc.

The Answer ("DTX Ansr.") of Sushil Prasad and Susea Prasad ("Debtors") admits and denies specific allegations in the Cross Claims. These include:

- A. Debtors admit the allegations of federal court jurisdiction, that the claims in this Cross Claim are core matters, and to the extent non-core, consent to the bankruptcy judge issuing final orders and judgement. DTX Ansr. ¶¶ 1, 2.
- B. Debtors assert six affirmative defenses, which include:
 - 1. Debtors acted in good faith based on the advice of counsel. DTX Ansr. ¶ 40.
 - 2. Debtors turned over \$26,000.00 of the proceeds to the Trustee, and should be credited that amount against any claim of TAFI. DTX Ansr. ¶ 41.
 - 3. Debtors assert that TAFI has failed to join a necessary party, Defendant Attorneys. DTX Ansr. ¶ 42.
 - 4. Debtors assert that the conduct of Defendant Attorneys is a superceding cause, which precludes TAFI asserting claims against Debtors. DTX Ansr. ¶ 45.

Summary of Cross Claim of Debtors Against Defendant Attorneys

Debtors have filed Cross Claims against Defendant attorneys. The allegations in the Cross-Claim ("DCC") include:

- A. This court has jurisdiction for the Cross-Claim pursuant to 28 U.S.C. §§ 1334(b) and 157(a), that this is core proceeding pursuant to 28 U.S.C. § 157(b)(A), (E), and (O), and to the extent non-core, Debtors consent to the bankruptcy judge entering all final orders and judgement thereon. DCC ¶¶ 1, 2.

- B. In the First Claim for Relief, Debtors assert that they are entitled to damages from Defendant Attorneys based on professional liability claims for damages incurred for the claims asserted by the Plaintiff Trustee and TAFI. DCC ¶¶ 13-20.
- C. In the Second Claim for Relief, Debtors assert claims for equitable indemnification and/or contribution from Defendant Attorneys for damages incurred in this Adversary Proceeding to Plaintiff Trustee and TAFI. DCC ¶¶ 21-22.

Summary of Answer to Debtors' Cross-Claim by Defendant Attorneys "DCC (Ansr.)"

In the Answer, Defendant Attorneys:

- A. Defendant Attorneys admit the allegations that federal court jurisdiction exists for the Cross-Claim. DCC Ansr. ¶ 1.
- B. Defendant Attorneys deny that the Cross-Claim is a core matter and does not consent to the bankruptcy judge entering final orders and judgment thereon. DCC Ansr. ¶ 2.
- C. Defendant Attorneys state fourteen affirmative defenses, which include:
 - 1. The claims of Debtors which are the subject of this Adversary Proceeding were claims of the Debtors and not property of the bankruptcy estate. DCC Ansr. ¶ 22.
 - 2. The claims of Debtors are barred by the applicable statutes of limitations, including, Cal. C.C.P. § 340.6. DCC Ansr. ¶ 28.
 - 3. Defendant Attorneys assert that they relied in good faith upon advice of counsel for the matters which are the subject of the Cross-Claim. DCC Ansr. ¶ 35.
 - 4. Defendant Attorneys assert that Debtors expressly and impliedly assumed the risk of loss and damage for the matters in the Cross-Claim. DCC Ansr. ¶ 36.

STATUS REPORT BY PLAINTIFF-TRUSTEE

On August 13, 2015, the Plaintiff-Trustee filed a Status Report (Dckt. 25) advising that a motion for leave to file a Second Amended Complaint has been filed. The hearing on the motion is set for October 1, 2015. By the second amended complaint the Trustee seeks to assert a claim for professional negligence against the Defendant-Attorneys. It is stated that the claim is asserted by the Plaintiff-Trustee, asserting to be an owner of the claim which was settled, and the Plaintiff-Trustee not having authorized the Defendant-Attorneys to settle the claim which is asserted to be property of the estate.

In the motion (Dckt. 19) reference is made to the investment upon which the Arbitration Claim is based, was made prior to the bankruptcy case. This was stated in the Debtors' declaration in support of confirmation of the second modified Chapter 13 Plan. 09-94269, Dckt. 94. It is alleged that Defendant-Attorneys owed a duty of care to Plaintiff-Trustee, as the successor to Debtors when the case was converted to one under Chapter 7.

The deadline for filing an opposition to the motion for leave to file second amended complaint has not expired.

FINAL BANKRUPTCY COURT JUDGMENT

The First Amended Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334, 151, and 157(a) and (b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (E). Complaint ¶¶ 2, 3, Dckt. 7.

In its Answer and Counterclaim, Defendant Meyer Wilson Co., LPA denies, on information and belief, that the Bankruptcy Court (federal court) has jurisdiction over this Adversary Proceeding pursuant to 28 U.S.C. §§ 151, 157(a), and 1334, and the referral of bankruptcy cases to this court pursuant to General Orders 182 and 223 of the United States District Court for the Eastern District of California. Answer ¶ 2, Dckt. 14. Based on information and belief, Defendant-Attorneys also denies that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(A) and (E). Answer ¶ 3, *Id.* To the extent that this is not a core proceeding, Defendant-Attorneys state that they do not consent to the bankruptcy judge entering final orders and the judgment. *Id.*

In the Counterclaim Defendant-Attorneys affirmatively pleads that the Bankruptcy Court has jurisdiction over the claims raised in this Adversary Proceeding pursuant to 28 U.S.C. §§ 157 and 1334, because this Adversary Proceeding relates to the Chapter 7 bankruptcy case of Defendant-Debtors.

MOTION TO WITHDRAW REFERENCE - CORE PROCEEDING DETERMINATION

On October 22, 2015, Defendant Attorneys filed a motion with the District Court to withdraw the reference of this Adversary Proceeding to this bankruptcy court. Motion, Dckt. 58. On February 4, 2016, the District Court entered an order denying the Motion to Withdraw the Reference. Dckt. 90 ("ED Cal Order"). The ruling of the District Court, E.D. Cal. 15-cv-2229, is summarized as follows:

- A. "The case [Adversary Proceeding] involves issues concerning whether the settlement proceeds are part of the bankruptcy estate and whether Meyer Wilson committed malpractice in representing the Debtors and misappropriating the proceeds." ED Cal Ord, p. 6:10-13.
- B. "Whether the proceeds were part of the bankruptcy estate hinges on when the underlying claims accrued. Claim accrual, in turn, is governed by state law and bankruptcy law - not other federal laws. *In re Goldstein*, 526 B.R. 13, 21 (9th Cir. B.A.P. 2015) Malpractice too is a state - not federal -question. *Ross v. Yaspan*, 2013 WL 3448725, at *4 (C.D. Cal. July 9, 2013)." *Id.*, p. 6:14-19.
- C. "Meyer Wilson has not shown that the rule in *Howsam* will arise in this case. Even if it did, there is no indication that the answer would involve more than "routine application" of the relevant law. The Court therefore holds that mandatory withdrawal is not warranted." *Id.*, p. 7:19-23.
- D. "The parties appear to agree that Meyer Wilson is entitled to a jury trial before the district court as to the malpractice claim. Mot. at 6-7; Trustee's Opp. at 6." *Id.*, p. 6:25-27.
- E. "The Ninth Circuit has held that the right to a jury trial does not

warrant transfer of all pre-trial proceedings to the district court. See *In re Healthcentral.com*, 504 F.3d 775, 787 (9th Cir. 2007) . The procedure by which the bankruptcy court handles pretrial matters and the district court conducts a trial is a well-worn procedure in this district." *Id.*, p. 8:3-8.

- F. "Most of the claims in this case appear to be core bankruptcy matters, because they "could arise only in the context of a bankruptcy case." See *Battle Ground Plaza, LLC v. Ray*,. 624 F.3d 1124, 1131 (9th Cir. 2010) (citation omitted) . Indeed, the thrust of the case is whether the settlement proceeds are assets of the bankruptcy estate. *Id.*; p. 8:26-28, 9:1-4.
- G. "To the extent there are other non-core matters, this Court follows the procedure set out by 28 U.S.C. § 157, whereby the bankruptcy court first considers the claims using its expertise in bankruptcy law and knowledge facts of the case and then "submit[s] proposed findings of fact and conclusions of law to the district court[.]" 28 U.S.C. § 157(c) (1)." *Id.*, p. 9:4-9.
- H. "The Court therefore finds it preferable for the bankruptcy court to continue handling pretrial matters. In the event that this case reaches trial, the issues of fact and law will be significantly narrowed and this Court will be well-equipped to oversee the case at that time."

STATUS CONFERENCE STATEMENT FILED BY DEBTORS

On February 10, 2016, Debtors filed their Status Conference Statement. Dckt. 91. Debtors repeat their allegations of federal court jurisdiction for this Adversary Proceeding and that the claims therein are core matters. Debtors also repeat their consent to the bankruptcy judge issuing all final orders and the judgments in this Adversary Proceeding.

STATUS CONFERENCE STATEMENT FILED BY PLAINTIFF TRUSTEE

The Plaintiff Trustee filed a Status Report on February 18, 2016. The Plaintiff Trustee reports that all Parties have exchanged initial disclosures.

STATUS CONFERENCE STATEMENT FILED BY DEFENDANT ATTORNEYS

Defendant Attorneys filed a Status Report on February 19, 2016. Dckt. 107. Defendant Attorneys state that all parties have exchanged their initial disclosures.

The Report recites that as between the Plaintiff Trustee and Debtors, the court approved a settlement in December 2015.

FINAL BANKRUPTCY COURT JUDGMENT

In the Second Amended Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334, 151, and 157(a) and (b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b) (2) (A) and (E). To the extent any claims are not core, Plaintiff Trustee consents to the bankruptcy judge entering all final orders and judgments in this Adversary Proceeding for the Second Amended Complaint and all Counterclaims and Cross-Claims as of the February 25, 2015 Status Conference.

TAFI and the Debtors agree that federal jurisdiction exists for this Adversary Proceeding and that it is a core proceeding. To the extent any claims are not core, TAFI and Debtors consent to the bankruptcy judge entering all final orders and judgments in this Adversary Proceeding for the Second Amended Complaint and all Counterclaims and Cross-Claims as of the February 25, 2015 Status Conference.

Defendant attorneys agree that federal jurisdiction exists for this Adversary Proceeding. While admitting that some of the claims are core proceedings, Defendant Attorneys do not consent to the bankruptcy judge entering all final orders and judgments in this Adversary Proceeding for the Second Amended Complaint and all Counterclaims and Cross-Claims for non-core matters.

Identification of Core Matters

The complexity of identifying core and non-core matters is increase by there being several Counterclaims and Cross-Claims. The court's review of the claims yields the following initial identification of core and non-core matters in this Adversary Proceeding:

SECOND AMENDED COMPLAINT (DCKT. 44)	
CORE or CONSENT	NON-CORE No Consent

<p>1. Determination if Claims Are Property of Estate.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 541.</p> <p>2. Claim to Avoid Transfer - 11 U.S.C. § 549 - Debtors.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 549.</p> <p>3. Claim to Avoid Transfer - 11 U.S.C. § 549 - Defendant Attorney.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 549.</p> <p>4. Claim to Avoid Transfer - 11 U.S.C. § 549 - TAFI.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 549.</p> <p>5. Claim For Violation of Automatic Stay - All Defendant.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. §§ 362 and 105(a), and the inherent power of the bankruptcy court.</p> <p>6. Claim For Turnover and Accounting - 11 U.S.C. § 542 - Debtors.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 542.</p>	<p>1. Claim For Professional Liability Damages - Defendant Attorney.</p> <p>a. Non-Core matter arising under State law for issues which remain after bankruptcy judge completes the core matter proceedings.</p>
DEFENDANT ATTORNEYS' COUNTERCLAIM (DCKT. 56)	
CORE or CONSENT	NON-CORE No Consent

<p>1. Claim for determination of Bankruptcy Estate's Interest (if any) in the Arbitration Claim and rights relating thereto.</p>	
<p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 541.</p>	

TAFI CROSS-CLAIMS (Dckt. 70)	
CORE or CONSENT	NON-CORE No Consent
<p>1. Contractual Indemnification - Debtors.</p> <p>a. Core matter arising in the bankruptcy case directly related to the core proceedings for determination of core matters and acceptance of Settlement for Bankruptcy Estate in the Second Amended Complaint.</p> <p>b. Parties to TAFI Cross-Claims have consented to bankruptcy judge issuing all final orders and judgment.</p> <p>2. Intentional and Negligent Misrepresentation - Cal. Civ. §§ 1709 and 1710 - Debtors</p> <p>a. Parties to TAFI Cross-Claims have consented to bankruptcy judge issuing all final orders and judgment.</p> <p>3. Equitable Indemnification and/or Contribution - Debtors</p> <p>a. Core matter arising in the bankruptcy case directly related to the core proceedings for determination of core matters and acceptance of Settlement for Bankruptcy Estate in the Second Amended Complaint.</p> <p>b. Parties to TAFI Cross-Claims have consented to bankruptcy judge issuing all final orders and judgment.</p>	<p>None</p>

<p>4. Restitution or Unjust Enrichment - Debtors</p> <p>a. Core matter arising in the bankruptcy case directly related to the core proceedings for determination of core matters, assets of Bankruptcy Estate received by Debtors, and acceptance of Settlement for Bankruptcy Estate in the Second Amended Complaint.</p> <p>b. Parties to TAFI Cross-Claims have consented to bankruptcy judge issuing all final orders and judgment.</p>	
DEBTORS' CROSS-CLAIM (DCKT. 72)	
CORE or CONSENT	NON-CORE No Consent
<p>1. Equitable Indemnification and/or Contribution - Defendant Attorneys</p> <p>a. Core matter arising in the bankruptcy case directly related to the core proceedings for determination of core matters and acceptance of Settlement for Bankruptcy Estate in the Second Amended Complaint.</p>	<p>1. Claim for Professional Liability - Defendant Attorneys</p> <p>a. No consent by Cross-Claim Defendant Attorneys.</p>

5. [09-94269-E-7](#) SUSHIL/SUSEA PRASAD
[15-9018](#) MF-2
FERLMANN V. PRASAD ET AL

MOTION TO COMPEL AND/OR MOTION
FOR SANCTIONS
1-26-16 [[80](#)]

No Tentative Ruling: The Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Meyer Wilson and Meyer Wilson's counsel on January 27, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions is -----.
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Stephen Ferlmann ("Plaintiff"), the Chapter 7 Trustee for the estate of Sushil Prasad and Susea Prasad ("Debtor"), filed the instant Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions on January 26, 2016. Dckt. 80.

The Plaintiff filed the instant Adversary Proceeding No. 15-09018 on

May 29, 2015. Dckt. 1. The Plaintiff served Meyer Wilson Co. LPA ("Meyer Wilson") with Plaintiff's Request for Interrogatories - Set One and Request for Production of Documents on August 27, 2015. The Plaintiff asserts that Meyer Wilson had until October 1, 2015 to respond. The Plaintiff gave a week extension at the request of Meyer Wilson. The Plaintiff asserts that on October 8, 2015, Meyer Wilson produced responses to both the interrogatories and request for documents. However, the Plaintiff argues that Meyer Wilson did not comply with the Federal Rules of Civil Procedure and objected to the requests on the basis of attorney-client privilege and/or work product doctrine. Furthermore, the Plaintiff asserts that Meyer Wilson did not produce a privilege log.

The Plaintiff received the privilege log and amended responses to the Request for Documents on October 16, 2015.

As to the interrogatories, Plaintiff argues that the responses are incomplete and evasive and the objections raised by Meyer Wilson are frivolous. The Plaintiff states that for most of the interrogatories answers, Meyer Wilson objected on the following grounds:

1. "Vague and ambiguous"
2. "Overbroad, unduly burdensome and oppressive"
3. "protected by the attorney-client privilege and/or work product doctrine"

The Plaintiff asserts that, because Meyer Wilson's responses are allegedly inadequate and its objections meritless, Meyer Wilson has waived any objections and must be ordered to full respond to the interrogatories listed on the separate document filed by Plaintiff in compliance with Local Bankr. R. 9014-2. Dckt. 82.

As to the request for documents, the Plaintiff begins by stating that the Debtor waived the protections provided by attorney-client privilege and work product doctrine pursuant to their attorney-client relationship with Meyer Wilson. On December 9, 2015, the court approved the settlement agreement between the Debtor and the Plaintiff in the underlying bankruptcy case which contained such waiver. Case No. 09-94269, Dckt. 148.

In light of this waiver, the Plaintiff asserts that the Plaintiff is entitled to the documents listed in the privilege log and Meyer Wilson should be ordered to produce them.

Plaintiff also requests that the court order Meyer Wilson to pay the attorney's fees and expenses of the Plaintiff due to Meyer Wilson's alleged improper objections, incomplete responses, and failure to provide the documents in the Privilege Log. The Plaintiff is seeking \$5,000.00 in reimbursement.

MEYER WILSON'S OPPOSITION

Meyer Wilson filed an opposition to the instant Motion on February 11, 2016. Dckt. 93.

Meyer Wilson first argues that Plaintiff did not attempt to meet and

confer on Meyer Wilson's responses and document production until after the December 9, 2015 court approval of the Settlement Agreement between Debtor and Plaintiff.

Meyer Wilson asserts that Plaintiff sent a meet and confer correspondence on December 11, 2015, claiming that because the Debtor agreed to waive the attorney-client privilege, Meyer Wilson must now amend their responses and produce the documents withheld on the basis of the attorney-client privilege and work product doctrine. Meyer Wilson alleges that there were no dates given to when Meyer Wilson should respond.

Meyer Wilson claims that the work product that Debtor had purportedly waived is inextricably intertwined with Meyer Wilson's clients who were also claimants in the Arbitration Claim but are not parties to the instant Adversary Proceeding and are not involved in the Debtor's legal malpractice claim. Meyer Wilson argues that it cannot produce the remaining documents identified in the privilege log because its non-party clients have not waived the privilege.

Due to the failure of Plaintiff to engage in good faith effort to resolve discovery disputes, Meyer Wilson asserts that the Motion should be dismissed. Meyer Wilson argues that, pursuant to Fed. R. Civ. P. 37, Plaintiff did not sufficiently engage and adequately certify that, prior to the instant Motion, Plaintiff made a good faith effort to resolve the disputes. Meyer Wilson argues that the December 11, 2015 letter alone is not sufficient to show a good faith effort, especially in light of Meyer Wilson allegedly contacting Plaintiff following the letter to meet and confer to resolve the disputes.

Additionally, Meyer Wilson claims that it has complied regarding Plaintiff's request for production of documents and has made all responsive documents, not subject to an objection, available to the Plaintiff. Meyer Wilson claims that it has produced all attorney-client correspondence between Meyer Wilson and Debtor to Plaintiff, as well as a supplemental privilege log. Meyer Wilson argues that the remaining documents that have been withheld are on the basis of work product and attorney-client privilege as these documents not only relate to Meyer Wilson's representation of the non-party clients who were also claimants in the Arbitration Claim. Due to the non-party clients not waiving their privilege, Meyer Wilson argues that it cannot produce those documents.

Meyer Wilson further alleges that it has provided complete and proper responses and objection to the Plaintiff's interrogatories. Meyer Wilson concedes that it did not adequately explain the basis for how the interrogatories were "vague and ambiguous," "overbroad, unduly burdensome and oppressive" and not relevant. However, Meyer Wilson claims that it attempted to meet and confer with the Plaintiff after the instant Motion was filed. Meyer Wilson asserts that it is working to supplement its responses to the interrogatories to address the concerns raised in the Motion.

As to the request that the court deem waived all of Meyer Wilson's objections and claims of privilege waived, Meyer Wilson asserts that this is improper. Meyer Wilson argues that it responded to the interrogatories and at the time the privilege had not been waived by the Debtor. As such, Meyer Wilson was under a duty to object on that basis and not provide responses to Plaintiff. The fact that the settlement between Plaintiff and Debtor does not retroactively make Meyer Wilson's prior objections meritless or improper

justifying waiver of all objections. Meyer Wilson once again argues that the Plaintiff's letter on December 11, 2015 was not sufficient as a meet and confer request.

Lastly, Meyer Wilson asserts that sanctions are premature and not warranted. Meyer Wilson reiterates that at the time of supplying the responses, the privilege had not been waived and that Meyer Wilson had complied with all discovery deadlines. Because the Plaintiff allegedly filed the instant Motion rather than attempting to meet and confer to settle the disputes, Meyer Wilson argues that sanctions are improper at this time.

PLAINTIFF'S REPLY

The Plaintiff filed a reply on February 18, 2016. Dckt. 100. The Plaintiff argues that Meyer Wilson continues to engage in a pattern of delay and has failed to respond fully to the discovery requests. The Plaintiff argues that it has acted in good faith to resolve the discovery disputes by offering a one-week extension for responses in October and then the letter on December 11, 2015. The Plaintiff asserts that it was not until February 10, 2016 that Meyer Wilson contacted Plaintiff to meet and confer. Plaintiff asserts that the delay was due to Meyer Wilson waiting for the District Court to rule on its Motion to Withdraw the Reference. It was not until the denial of the Motion to Withdraw the Reference that the Plaintiff alleges Meyer Wilson attempted to confer with Plaintiff.

Additionally, Plaintiff argues that Meyer Wilson should be ordered to produce the documents identified in the amended privilege log and to supplement its responses to the interrogatories. Plaintiff alleges that, to the extent the documents in the amended privilege log pertain to Meyer Wilson's representation of group two claimants in the Arbitration Claim, which the Debtor was a part of, and not specific to claimants other than the Debtor, Plaintiff is entitled to those documents. Specifically, the Plaintiff asserts that it is entitled at a minimum to the following documents that relate to group two claimants:

1. MWC000273-232
2. MWC000324
3. MWC000326-MWC000327
4. MWC000332-MWC000333
5. MWC000337
6. MWC000345
7. MWC000348
8. MWC000354
9. MWC000356
10. MWC000366
11. MWC000370

12. MWC000372
13. MWC000375-MWC000382
14. MWC000539-MWC000541
15. MWC000543

Plaintiff argues that if in these documents there is specific information with respect to a claimant other than the Debtor, Plaintiff argues that Meyer Wilson can redact that information.

Plaintiff asserts there are documents that pertain only to Debtor, relate to the Debtor's bankruptcy, and documents produced by experts or consultants with respect to the arbitration claim that should be provided. Specifically, the Plaintiff lists the following documents:

1. MWC000330
2. MWC000349-MWC000350
3. MWC000577-MWC000580
4. MWC000634-MWC000669

SUPPLEMENTAL DECLARATION OF KRISTIN IVERSEN

Meyer Wilson filed the supplemental declaration of Kristin Iverson on February 19, 2016. Dckt. 104. Ms. Iverson testifies that Meyer Wilson hand served amended interrogatory responses as well as an additional document originally withheld on the basis of the attorney-client privilege between Meyer Wilson and its attorney Kathy Phelps an February 19, 2016.

Ms. Iverson also asserts that Meyer Wilson has not purposefully attempted to hinder discovery. Rather, Ms. Iverson claims that Meyer Wilson acted with the intent of protecting the privilege of clients in the arbitration claim that had not waived their privilege.

Ms. Iverson attaches the February 12, 2016 email chain between Ms. Iverson and Plaintiff's counsel and the amended interrogatory and document production responses. Dckt. 105, Exhibit A and B.

APPLICABLE LAW

Discovery

Federal Rule of Civil Procedure 37(a)(1), made applicable in bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 7037, requires that a motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." Federal Rule of Civil Procedure 37 Civil Rule 37(c) sanctions the failure to supplement discovery responses.

The certification requirement of Federal Rule of Civil Procedure 37(a)(1) was described in *Shuffle Master v. Progressive Games*, 170 F.R.D. 166 (D. Nev. 1996) as comprising two elements:

[T]wo components are necessary to constitute a facially valid motion to compel. First is the actual certification document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the performance, which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2) conferred or attempted to confer. Each of these two sub components must be manifested by the facts of a particular case in order for a certification to have efficacy and for the discovery motion to be considered.

Shuffle Master, 170 F.R.D. at 170. The court went further, stating that "[A] moving party must include more than a cursory recitation that counsel have been 'unable to resolve the matter.'" 170 F.R.D. at 171.

If the party on whom the interrogatories were served responds by serving objections to some or all of the interrogatories, or serves answers that the interrogating party considers evasive or incomplete, and if the propounding party has tried unsuccessfully to negotiate a resolution of the dispute, a motion for an order compelling answers may be appropriate. 7-37 Moore's Federal Practice, § 37.02 (Matthew Bender 3d ed.)

Federal Rule of Civil Procedure 37(a)(3) and Federal Rule of Bankruptcy Procedure 7037 provide that upon the failure to provide a Response to Interrogatories or Production of Documents the court may compel such Responses and Productions, and order appropriate sanctions. The sanctions which may be ordered by the court include:

- (1) directing that the matters or facts which are the subject of the discovery are established for the adversary proceeding as asserted by the requesting party;
- (2) prohibiting the party failing to produce the discovery from supporting or opposing designated claims or defendants, or introducing designated matters into evidence with relate to the discovery;
- (3) Striking pleadings (including the Answer), in whole or in part;
- (4) Issuing a default judgment against the party failing to provide the Responses or Produce the Documents; or
- (5) Treating as contempt of a federal court order the failure to comply with the order to provide Responses to the Interrogatories or Produce the Documents.

For a party seeking reasonable payment of expenses in bringing a motion for an order to compel discovery, Federal Rule of Civil Procedure Rule 37(a)(5) states "If the motion is granted-or if the disclosure or requested discovery is provided after the motion was filed-the Court must, after giving an opportunity to be heard, require the party or deponent whose conduct

necessitated the motion, the party or attorney advising that conduct, or both to pay the movement's reasonable expenses incurred in making the motion, including attorney's fees".

Sanctions and Contempt

Bankruptcy Courts have the jurisdiction to impose sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-49 (9th Cir. 2004). The court also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see also 11 U.S.C. § 105(a).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings file with the court. If a party or counsel violates the obligations and duties imposed under Rule 9011, the bankruptcy court may impose sanctions, whether pursuant to a motion of another party or sua sponte by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

A Bankruptcy Court is also empowered to regulate the practice of law before it. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.* 501 U.S. 32,43 (1991); see also *Lehtinen*, 564 F.3d at 1058.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience to a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemtor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Lehtinen*, 564 F.3d at 1058. However, the court cannot issue punitive sanctions pursuant to its power to regulate the attorneys or parties appearing before it. *Id.* at 1059.

DISCUSSION

To begin, the court first starts with the Statement filed by the Plaintiff, in compliance with Local Bankr. R. 9014-2, which outlines the discovery responses the Plaintiff alleges are insufficient.

1. Interrogatories

a. No. 1:

- i. Interrogatory: "Please state the full name, address, job title and employer of each Person answering and assisting in answering these Interrogatories."
- ii. Response: "Meyer Wilson Co., LPA with the assistance of its attorneys of record Murphy Pearson Bradley & Feeney."

b. No. 7:

- i. Interrogatory: Do You contend that the Debtors breached any obligation or duty under any contract between You and the Debtors?"
- ii. Response: "Responding Party objects to this request on the grounds that it vague and ambiguous. Responding Party further objects to the extent that it requests information that is protected by the attorney-client privilege and/or work product doctrine. Responding Party objects to this interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive. Responding Party objects to this interrogatory on the ground that the information sought is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence."

c. No. 8:

- i. Interrogatory: "Do You contend that the Debtors failed to follow any instructions or directions, issued by You, that adversely affected the Arbitration Claim?"
- ii. Response: "Responding Party objects to this request on the grounds that it vague and ambiguous. Responding Party further objects to the extent that it requests information that is protected by the attorney-client privilege and/or work product doctrine. Responding Party objects to this interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive. Responding Party objects to this interrogatory on the ground that the information sought is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence."

d. No. 9:

- i. Interrogatory: "Please state the full name, mailing address, e-mail address and telephone number of each Person, having any knowledge of the relevant facts relating to the basis of this adversary proceeding, the cause thereof, or the damages resulting therefrom."
- ii. Response: "Witnesses include the Prasads, and the attorneys and staff employees of Meyer Wilson Co., LPA. The relevant contact information of the witnesses are known to the Propounding Party."

e. No. 11:

- i. Interrogatory: "In connection with Your representation of the Debtors in the Arbitration Claim, did you consult with any expert? If so, please provide:

- (1) The name, mailing address, e-mail address and telephone number of such expert;
- (2) The name of the employee, agent, representative, attorney or investigator of You who sought such expert's opinion and the date such opinion was sought;
- (3) The opinion, whether tentative, preliminary, or final, rendered by such expert, and the date such opinion was rendered;
- (4) Please provide copies of any such expert's writing, documents or reports, as well as copies of your writings, documents or memoranda about such expert's opinion;
- (5) If such expert did not prepare a writing, document or report concerning the investigation or opinion, whether You prepared a writing, document or memorandum about such experts opinion."

ii. Response: "Responding Party objects on the grounds that it is vague and ambiguous as to the term 'consult' and 'expert'. Responding Party further objects to this request to the extent that it requests information that is protected by the attorney - client privilege and/or work product.

Without waiving and subject to the foregoing, Responding Party responds as follows: Meyer Wilson Co., LPA retained expert witness {P. Richard Evans, 9450 N. Meridian Street, Suite 300, Indianapolis, IN 46260 solely to calculate damages in connection with Meyer Wilson Co., LPA's representations of the Prasads. Meyer Wilson Co. LPA will produce documents in its possession in response to the above interrogatory to the extent the request is not objectionable, if any."

f. No. 13:

i. Interrogatory: "Please describe all Communications between You and attorney Kathy Phelps regarding the Debtor's bankruptcy. For each Communication, state its substance, identify the date, all Persons in attendance, the location, and all documents discussed or referred to.

ii. Answer: "Responding Party objects on the grounds that it is vague and ambiguous. Responding Party further objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product. Kathy Phelps was retained

as a legal consultant in the FINRA arbitration and was not disclosed or used as an expert witness in that action."

g. No. 15:

i. Interrogatory: "Please state Your opinion as to whether the settlement of the Arbitration Claim for \$105,000 was fair and reasonable and state all facts in support of your opinion."

ii. Answer: "Responding Party objects on the grounds that it is vague and ambiguous. Responding Party further objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product.

Without waiving and subject to the foregoing objections, Responding Party responds as follows: Based on 15 years' experience representing approximately 1,000 investors with claims against brokerage firms in FINRA arbitration, including numerous cases similar to claims pursued in this underlying claim, this settlement was extremely fair and reasonable."

h. No. 17:

i. Interrogatory: "Please identify with particularity when, where and how You were notified of the Debtors' bankruptcy."

ii. Answer: "Responding Party objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product."

i. No. 19:

i. Interrogatory: "Describe all Communications between the Debtors and You regarding the underlying facts supporting the Arbitration Claim, including their investments with Vincent Thakur Signh. For each Communication, state its substance, identify the date, all Persons in attendance, the location, and all documents discussed or referred to."

ii. Answer: "Responding Party objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product.

Without waiving and subject to the foregoing objections, Responding Party responds as follows: Meyer Wilson Co., LPA does not recall exact specifics with regard to the date and substance of all communications with the Prasads."

j. No. 20:

i. Interrogatory: "Please describe with particularity all amounts, dates, and methods by which You received payments from Transamerica in connection with the Arbitration Claim."

ii. Answer: "Responding Party objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product. Responding Party objects to this request on the grounds that it is vague and ambiguous and overbroad."

Without waiving subject to the foregoing objections, Responding Party responds as follows: Transamerica Financial Advisors, Inc. sent a check via Federal Express to Meyer Wilson Co., LPA on May 16, 2013 relating to the Arbitration Claim. The amount of the payment is confidential, as it relates not only to the Prasads, but to other non-parties to this lawsuit."

k. No. 22:

i. Interrogatory: "Please identify in detail all written, recorded or oral statements that You have obtained from the Debtors in connection with the Arbitration Claim, including the date the statement was obtained and the name of the Person obtaining the statement."

ii. Answer: "Responding Party objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product, or other applicable privilege."

Without waiving and subject to the foregoing objections, Responding Party responds as follows: Meyer Wilson Co., LPA does not recall exact specifics with regards to the date of all communications with the Prasads."

2. Request for Documents

a. The Plaintiff asserts that Meyer Wilson submitted a Privilege Log and is required to provide the documents listed in the Privilege Log because the Debtors waived all confidentiality and privileges pursuant to their attorney-client relationship with Meyer Wilson as detailed in the Settlement Agreement.

Dckt. 82.

The Plaintiff relies on the Settlement Agreement between the Plaintiff and the Debtor as grounds that the attorney-client privilege and confidentiality have been waived. On November 12, 2015, the Plaintiff filed a Motion to Approve Settlement Agreement in the underlying bankruptcy case. Case No. 09-94269, Dckt. 139. The court approved the settlement on December 3, 2015. Case No. 09-94269, Dckt. 139. The specific provision of the settlement which

is the heart of the instant Motion is § 1.3 which states:

- 1.1 Debtors shall pay to the Trustee the sum of \$26,000.00 in full and complete settlement of the claims asserted against the Debtors in the Adversary Proceeding. Receipt of said payment is acknowledged.
- 1.2 The Debtors shall cooperate with the Trustee and Trustee's Counsel in testifying to the facts of the Adversary Proceeding, the Arbitration Claim, and Meyer Wilson's representations of the Debtors, including but not limited to:
 - (a) Providing to the Trustee and Trustee's counsel all documents including but not limited to writings, memoranda, notes, correspondence, statements, expert reports, pleadings, financial records, checks, and agreements in their possession relating to the arbitration claim, the Adversary Proceeding, and Meyer Wilson's representation of the Debtors.
 - (b) Cooperation with the Trustee and Trustee's counsel in obtaining all papers and property (client file), including but not limited to writings, memoranda, notes, correspondence, statements, expert reports, pleadings, financial records, checks, and agreements held with Meyer Wilson with respect to their representation of the Debtors.
- 1.3 The Debtors hereby waive confidentiality and privileges pursuant to the attorney-client relationship with Meyer Wilson, and consent to the disclosure of information to the Trustee and Counsel for Trustee, which are confidential and privileged. The Debtors waive the attorney-work product privilege in all respects.

Case No. 09-94269, Dckt. 143, Exhibit C. The settlement is signed by the Debtor and by the Debtor's attorney.

February 25, 2016 Hearing

After reviewing the papers in connection with the instant Motion, it is clear to the court that the professional discourse between some counsel and parties in this Adversary Proceeding has broken down. While parties and their counsel may elect to so engage in such conduct, it does not come without a cost. (Whether it be sanctions, monies expended unproductively for attorneys' fees, or the ultimate fees which attorneys may be paid by their clients.)

XXXXXX

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions filed by Stephen Ferlmann, the Plaintiff-Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions is
xxxxxxxxxxxxxxxxxxxxxxxxxxxx.

6. [10-31088-E-13](#) JODY/CRAIG POE
[15-2204](#) JGD-6
POE ET AL V. U.S. BANK, N.A.

MOTION FOR ENTRY OF DEFAULT
JUDGMENT
1-10-16 [[13](#)]

Final Ruling: No appearance at the February 25, 2016 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, US Bank NA, on January 11, 2016. Case No. 15-02204, Dckt. 17. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Default Judgment is granted.

Craig S. And Jody L. Poe ("Debtors-Plaintiffs") filed the instant Motion for Default Judgment on January 11, 2016. Case No. 15-02204, Dckt. 13.

Debtors-Plaintiffs filed a Chapter 13 petition on April 28, 2010. Case No. 10-31088, Dckt. 1. On July 15, 2010, the court granted Plaintiff-Debtors' Motion to Value the Collateral of Defendant and valued the claim at \$0.00. Case No. 10-31088, Dckt. 37. In the underlining bankruptcy case, a discharge was entered as to the Plaintiff-Debtors on October 23, 2015. Case No. 2010-31088, Dckt. 99. The Bankruptcy Court Noticing Center mailed a Notice of Discharge to Defendant on October 24, 2015. Case No. 2010-31088, Dckt. 100.

On October 23, 2015 the Plaintiff-Debtors received a discharge pursuant to 11 U.S.C. § 1328, to include the claim of US Bank NA. Case No. 2010-31088, Dckt. 99.

Plaintiff-Debtor filed the instant Adversary Proceeding on October 23, 2015. The Complaint for Judgment Voiding Lien requested the following relief:

1. A judgment voiding the Lien;

The summons and complaint were served on Defendant and Registered Agent. Service was made on Defendant within fourteen days of the date that the

summons was issued. The summons was properly served on Defendant on October 26, 2015. Case No. 15-02204, Dckt. 6.

Defendant was required to file an answer or other responsive pleading to the Complaint or a motion pursuant to Fed. R. Bankr. P. 7012 on or before November 25, 2015. Case No. 15-02204, Dckt. 9. The Defendant did not file an answer, a motion, or other responsive pleading.

An Entry of Default was entered by the Clerk of the Court on December 10, 2015. Case No. 15-02204, Dckt. 10.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. See *id.* at 775.

DISCUSSION

Applying these factors, the court finds that the Plaintiff will be prejudiced if the second deed of trust is not reconveyed, or the court does not enter judgment determining the Deed of Trust is void and the property held free of such purported interests thereunder. The continued existence of

record of the Deed of Trust will cloud title and restrict Plaintiff's full and unfettered use of her real property and interests therein. The court recently discussed the effect of a completed Chapter 13 Plan and the effect on a secured claim determined by the court pursuant to 11 U.S.C. § 506(a) in *Martin v. CitiFinancial Services (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013).

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff's bankruptcy case regarding the motion to value Defendant's secured claim to have a value of \$0.00 or confirmation of the Chapter 13 Plan. Further, there is no evidence of excusable neglect by the Defendant. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against the Defendant.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Entry of Default Judgment filed by Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Entry of Default Judgment is granted. The court shall enter judgment determining that the second deed of trust, and any interest, lien or encumbrance pursuant thereto, held by US Bank NA against the real property commonly known as 16241 Edinburgh Dr., Truckee, California 96161, recorded on April 8, 2008 with the County Recorder for Nevada County, California, is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that US Bank NA has no interest in the real property pursuant to the Deed of Trust.

Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgment shall further provide that any attorneys' fees and costs allowed by the court shall be enforced as part of the judgment.